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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDGARD FELIX MADERA, Defendant and Appellant.	B213628 (Los Angeles County Super. Ct. No. BA313038)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed.

Leonard Chaitin and David Issapour for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Defendant and appellant Edgard Felix Madera was charged by information with the murder of Gilberto Gonzalez on July 17, 2006 (Pen. Code, § 187, subd., (a)).[1] It was further alleged that defendant personally and intentionally discharged a firearm which caused great bodily injury and death within the meaning of section 12022.53, subdivision (d); personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); and personally used a firearm within the meaning of section 12022.53, subdivision (b).

B. *Evidence at Trial*

1. *Prosecution's Case*

On July 17, 2006, at approximately 9 p.m., the victim, Gilberto Gonzalez, was walking to a liquor store located at 55th and Central in Los Angeles with Helen Alfaro and Vanessa Nuno. Alfaro and Nuno noticed a green Toyota Camry carrying a passenger in the front seat. The Camry drove past them several times. Alfaro recognized the passenger as defendant, whom she knew as "Vale."[2] Defendant was wearing a beige shirt.

Gonzalez, Alfaro and Nuno were walking away from the liquor store, when Gonzalez decided to return for something he had forgotten. Alfaro and Nuno

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[1] Undesignated statutory references are to the Penal Code.

[2] Alfaro did not recall saying "what's up?" to defendant. A detective who interviewed her after the crime occurred testified that during the interview, Alfaro had reported making the statement. The detective also testified that Nuno reported during an interview that Alfaro had said: "'That looks like Vale.'" The prosecution played a tape of defendant's interview with detectives in which he stated that he and "Helen" were acquainted and that Helen knew him as Vale.

walked a bit farther and waited for Gonzalez a short distance away from the store's entrance. Alfaro and Nuno saw Gonzalez exit the store and stop in front to light a cigarette. The green Camry stopped near him. According to Alvaro, defendant, still wearing the beige shirt but now with a bandanna as a mask, got out of the car, appeared to say something to Gonzalez, and then shot him several times. Defendant got back into the car, which immediately drove away.

Nuno confirmed that the shooter's face was covered with a bandanna but did not identify him. Alfaro initially did not tell the police that she recognized defendant because she feared for her life. Instead, she said that she recognized the Camry as belonging to someone named "Moreno," who was known for terrorizing the neighborhood. Alfaro did not mention defendant by his nickname or identify him in a photographic lineup until the second time she was interviewed by the police.

Defendant's mother, Maria Rosas Santana, recalled that defendant's friend "Cesar" dropped by their house near the end of July 2006. Santana heard Cesar mention "Central" and say something about his car.[3] The police located a green Toyota Camry that had been registered to "Cesar Gonzalez" until March 2008, when it was transferred to another individual.

Detective Miguel Terrazas interviewed defendant after his arrest and told him -- falsely -- that he had been identified by three witnesses and that the entire incident had been caught on videotape. Defendant was then placed with another inmate in a cell containing surveillance equipment. In the recorded conversation,

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[3] The prosecution played an audiotape of defendant's interview with police officers following his arrest in November 2006, in which he stated that his friend Cesar owned a green Toyota Camry. During the interview, defendant also informed the detectives that Cesar was in Mexico, on "vacation."

played for the jury, the other inmate asked defendant if the authorities had any evidence against him "on that murder." Defendant responded: "Just [three] fucking bitches, man." The other inmate asked defendant if any witnesses would say he was somewhere else. Defendant responded: "Yeah, my homie." The other inmate advised defendant to be sure he had "a girl." Defendant responded: "[M]y homie she's already done that." Defendant also stated: "[S]upposedly the police -- they were trying to claim they have a video . . . ," but that "they can't . . . because I was covering . . . up my face . . . with a bandanna." Apparently referring to the alleged witnesses, defendant stated: "I know no one saw my fucking face. Cause I had a fucking beanie, todo tapado . . . ."[4] Apparently referring to the possibility that he had been seen in the Camry by witnesses prior to the shooting, defendant said: "They saw me when I passed through their house . . . I was in a car, and I passed through . . . And they saw me at the time of the fucking crime scene . . . [¶] . . . [¶] they saw me around there . . . That's the only way that --" The other inmate interjected: "And in the same car?" Defendant responded: "Yeah."

During the examination of Detective Terrazas, the prosecutor asked whether the phrase "just [three] fucking bitches" had any "significance." Defense counsel objected on grounds of relevance. The objection was overruled. The detective explained defendant was referring to the three persons who allegedly identified him. As the prosecutor proceeded to ask Detective Terrazas additional questions about various other remarks made by defendant during the recorded conversation with the other inmate, defense counsel asked that his relevance objection be deemed a "continuing objection." The court stated that the objection would be noted. The prosecutor and witness thereafter engaged in the following colloquy:

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[4] "[T]odo topado" was translated as "all covered" or "all covered up."

Question: "Now, . . . when the defendant makes reference to the police trying to claim they have a video, did that have any significance to you?" Answer: "Yes." Question: "Okay. And what was that significance to you?" Answer: "The significance was that we told defendant Madera during the first interview . . . that . . . there was video surveillance footage that captured the entire incident . . . ." Question: "So when the defendant expresses some concern or . . . some disbelief, . . . where he says, . . . 'They can't . . . because I was covering . . . up my face . . . with a bandanna. So I don't even -- they don't -- there's -- fucking wrong with that,' did that have some significance to you?" Answer: "Yes." Question: "And what was that significance?" Answer: "That witnesses out at the crime scene had identified the suspect who had shot victim Gonzalez as being covered up, having a bandanna over his face, from the nose down." Question: "Okay. And since you and your partners had not disclosed that piece of evidence to the defendant, why was it . . . significant that he said that he was covering up his face with a bandanna?" Answer: "Well, it's only -- it's certain information that only the shooter involved in this crime would be privileged to."

Defense counsel interjected an objection based on speculation and moved to strike. The court denied the motion because "the witness qualifies as an expert witness in this particular field of homicide investigation of this particular jurisdiction . . . ."

During cross-examination of Detective Terrazas, defense counsel asked whether defendant could have obtained the information about the shooter having worn a mask in other ways, such having been told by the actual shooter or a witness or by hearing rumors or gossip. Detective Terrazas agreed that that was a possibility.

2. *Defense Case*

The defense called David Reyes (Reyes) and his sister, Ester. Both testified that on July 17, 2006 from 3 or 4 p.m. until midnight, defendant and Reyes were at the latter's home, working on an apartment owned by Reyes's family, playing electronic games, drinking beer and smoking marijuana. During this period, defendant received one or more cell phone calls. Reyes testified that he picked defendant up that afternoon, brought him to work on the apartment, and took him back home.

Defendant testified on his own behalf. He stated that on July 17, 2006, the day of the shooting, he went to downtown Los Angeles in his sister's car to pay a ticket. When he returned, he went out for a beer with his friends, Cesar Gonzalez and Adrian Garcia.[5] Cesar and Garcia dropped defendant off at defendant's house, where Reyes picked him up to work on the apartment. During the time defendant was with Reyes, defendant received a call in which he learned he had been accused of involvement in a crime. Reyes and his brother drove defendant home at midnight. Later that week, Cesar came to defendant's house to tell defendant that he was leaving for Mexico. Cesar also told him about being involved in a shooting with a man who had covered his face or worn a mask.

Defendant testified that when he was in the cell equipped with surveillance equipment, he told the other inmate things that were not true because he was afraid of getting beat up and was trying to "act tough." Defendant recalled that the detectives who interviewed him after his arrest said something about a mask.

During cross-examination, the prosecution played a tape of a telephone call between defendant and "Chato" in which defendant said he was locked up and that

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[5] Because Cesar Gonzalez shares a surname with the victim, he will be referred to by his first name.

Chato should say "what Eric told you," including "what time you called me" and that "I was in East LA when you called me."[6] Also during cross-examination, defendant admitted he knew that a murder had been committed using Cesar's car and that Cesar had "hit the guy up." He further conceded that he had given detectives different versions of his July 17 activities on the day he was interviewed.[7]

C. *Verdict and Sentencing*

The jury found defendant guilty of first degree murder and found the gun use allegations true. The court sentenced defendant to a term of 25 years to life, plus 25 years to life for the section 12022.53, subdivision (d) enhancement.

DISCUSSION

The issues raised on appeal relate to a portion of the testimony of Detective Terrazas. When asked about the significance of defendant's statement on the audiotape that he was wearing a bandanna, Detective Terrazas stated that witnesses at the crime scene had identified the shooter as having a bandanna over his face and that it was "information that only the shooter involved in this crime would be privileged to." Defendant contends: (1) the testimony violated the Confrontation

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[6] During his interview with detectives, defendant identified Chato as the person who called on the night of the shooting to inform defendant that he had been accused of being involved.

[7] In defendant's audiotaped interview with the detectives played to the jury, defendant denied committing the crime. He said he was at David Reyes's house at the time it was committed. However, he did not say he was doing work on an apartment owned by Reyes's family. He further stated that Cesar's sister -- rather than Reyes -- drove him to Reyes's house, and that he was driven home by Reyes's brother -- rather than by both Reyes and his brother.

Clause under the principles discussed in *Crawford v. Washington* (2004) 541 U.S. 36 because the detective's opinion "necessarily entailed hearsay," and (2) the testimony was improper expert testimony.

We perceive no *Crawford* error here. In *Crawford*, the United States Supreme Court held that out-of-court statements which are testimonial in nature are inadmissible unless the declarant is unavailable and the accused had a prior opportunity to cross-examine him or her. As defendant appears to recognize, Detective Terrazas's opinion regarding the significance of defendant's statements was not hearsay. Nor did it rely on hearsay. That witnesses to the crime had seen the shooter wearing a bandanna over his face was established by the in-court testimony of Alfaro and Nuno.

Defendant's alternate contention that the quoted portion of Detective Terrazas testimony represented improper expert opinion has merit. Expert opinion must be limited to subjects that are "beyond common experience." (Evid. Code § 801, subd. (a).) "[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. 'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.' [Citation.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 47.) Expert opinion is not admissible, therefore, "if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*Id.* at p. 45.) Whether defendant's audiotaped statement concerning the bandanna was "significant" was not a proper subject of expert testimony. The jury was as competent as Detective Terrazas to decide whether defendant's knowledge that the shooter wore a bandanna was information likely to be known only by a participant in the crime. By asking Detective Terrazas to comment on the significance of the statement, the prosecutor was essentially asking the detective to advise the jury

whether a particular piece of evidence supported guilt, something the jury must decide for itself.[8]

Respondent contends that objection to the admissibility of the testimony was forfeited because defense counsel objected only on the ground of "speculation," not on "improper expert testimony grounds." Respondent overlooks that the court recognized a continuing "relevance" objection to the line of questioning. As the topic was not the proper subject of expert testimony, any "significance" the evidence had to Detective Terrazas was irrelevant.

Although we agree that the court erred in overruling the objections to the quoted testimony and that the error was preserved for consideration on appeal, we find no prejudice. Alfaro and Nuno both testified that the shooter covered his face with a bandanna before exiting the green Camry to shoot Gonzalez. Subsequently, defendant's entire taped interview was played for the jury. Nowhere did the detectives mention that the shooter was wearing a bandanna to conceal his face. To the contrary, they suggested that defendant had been seen and recognized by several witnesses and taped by a video camera during the crime. Thus, the significance of defendant's statement to the other inmate that he was wearing a bandanna and that his face was "all covered up" was obvious and could not have escaped the jurors' notice. Moreover, the evidence against defendant was overwhelming. He essentially admitted being the shooter in his conversation with the other inmate. Defendant was seen committing the crime by Alfaro, who knew him. Defendant's friend Cesar owned a green Toyota Camry and left the country

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[8] We note that on re-direct, the prosecutor asked Detective Terrazas to explain whether in context, defendant's statement concerning the bandanna suggested "[t]hat somebody else told him or that it was the defendant who was actually the shooter." Defense counsel objected on the ground of improper opinion, and the court sustained the objection, noting that defendant's audiotaped statement "will speak for itself."

shortly after the crime occurred. Defendant was taped trying to set up an alibi during his telephonic conversation with "Chato." The story defendant gave the detectives in the interview concerning his activities on July 17 contradicted in several particulars the story he and the other defense witnesses related in their testimony at trial. Accordingly, there is no reasonable probability that defendant would have achieved a more favorable result if the court had sustained the objection. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.